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Supreme Court, U.S.
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NO. 85-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF ARIZONA,

Petitioner,

-vs-

JOHN HARVEY ADAMSON,

Respondent,

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After a defendant breaches his plea agreement by refusing to testify, do double jeopardy principles prohibit the state from refiling the original charge as provided for in the plea agreement in which the defendant agreed that, if he breached the agreement, the original first-degree murder charge would be refiled and he would be subject to the death penalty?

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JUDGMENT SOUGHT TO BE REVIEWED

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Arizona Attorney General on behalf of the State of Arizona and James G. Ricketts, Director, Department of Corrections, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on the 9th of May, 1986, and the Motion for Rehearing denied on the 6th of June, 1986.

OPINION BELOW

The Ninth Circuit's en banc opinion, with four dissents, holding that John Harvey Adamson's voluntarily chosen course of conduct, previously determined by the Arizona Supreme Court to be a breach of his plea agreement, did not deprive him of the protection of double jeopardy, that Arizona could not try him on the original murder charge, that only an express waiver of that protection would suffice, and that, neither by the terms of the plea agreement, nor by his deliberate actions, did he surrender that protection. That opinion is Appendix A to this petition; the denial of the motion for rehearing is Appendix B.

STATEMENT OF JURISDICTION

John Harvey Adamson appealed the order of the United States District Court for the District of Arizona denying his application for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

The Ninth Circuit entered its opinion reversing May 9, 1986, and denied rehearing June 6. This petition is timely filed within 60 days of the order denying the motion for rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

The pertinent portion of the Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

STATEMENT OF FACTS

June 2, 1976, John Harvey Adamson attached an explosive device to the underside of reporter Don Bolles' Datsun, beneath the driver's seat. While he was doing this, Bolles was in the Clarendon House Hotel, lured there by Adamson in hopes Adamson would give him investigative leads in a case. Having previously examined the underside of a Datsun at a dealership, Adamson performed his grisly task expertly. After placing the bomb, he left the Clarendon and placed a telephone call to Bolles waiting in the lobby of the Clarendon. Adamson told Bolles he could not meet with him that day and they agreed to meet later. Bolles left, and as he began to back out of his parking space, the bomb was detonated by a cohort of Adamson's with a remote control device at the far end of the parking lot. The force of the

explosion literally tore Bolles apart. He lingered for 9 days during which time three of his limbs were amputated. Before dying, he identified a picture of Adamson as the man who made the appointment to meet him at the Clarendon House.

Armed with a search warrant, police found in Adamson's apartment materials similar to those in the bomb.

On January 15, 1977, while the jury was being chosen to try Adamson for first-degree murder, he, counseled by three attorneys, entered into a plea agreement. In exchange for his testimony and cooperation whenever needed in this and other cases -- inside or outside the courtroom -- the state accepted a plea to second-degree murder with a stipulated actual sentence of 20 years 2 months. That plea agreement contained provisions stating that, if Adamson breached it,

reinstatement of the original charge was automatic, the parties would be back in their original posture before the plea, and Adamson, if found guilty of first-degree murder, would be subject to the death penalty or life imprisonment.

The state trial judge painstakingly reviewed the plea agreement with Adamson in open court, almost word for word. Adamson claimed to have 4 years of college. He told the judge that he understood the agreement, had discussed it with his three attorneys, and knew that, if he breached it, he could be prosecuted for first-degree murder. The judge accepted the plea, but deferred sentencing pursuant to a provision in the agreement. Later that same year, Adamson's testimony convicted Max Dunlap and James Robison of the murder of Don Bolles. A year after that Adamson was sentenced.

In early 1980, the Arizona Supreme Court reversed the convictions of Dunlap and Robison. In preparation for the retrial, Assistant At orney General Stanley Patchell spoke with one of Adamson's attorneys, William Feldhacker, by phone to arrange an interview with Adamson. On April 3, Feldhacker wrote a letter to the Attorney General in which he said that Adamson would not testify again unless the state acceded to his "non-negotiable demands". The language made it plain that it was John Harvey Adamson conveying himself explicitly and personally through counsel. The letter also acknowledged that the state would probably consider Adamson's refusal to testify a breach of the plea agreement. Finally, Adamson wrote he was aware that a breach of the agreement by him meant that the state could prosecute him for first-degree murder and that a death penalty was possible.

Assistant Attorney General and Criminal Divison Chief Counsel, William J. Schafer III, responded by letter on April 9. He informed Adamson, through his counsel, that the plea agreement contemplated his cooperation whenever required, and that his refusal to make himself available for an interview, in preparation for the retrial, was a breach of the plea agreement that subjected him to prosecution on the original charge. The state set Adamson for a deposition but when he appeared he refused to answer questions. He claimed the protection of the Fifth Amendment. He argued that, with the April 9 letter, the state had decided that he had breached the agreement, and that, without an agreement, he could not testify.

The state then refiled the original first-degree murder charge against Adamson.

Adamson filed a motion in superior court asking that the charge be dismissed. He argued that he already stood convicted of the murder of Don Bolles. But the trial court denied his motion. He then filed a special action in the Arizona Supreme Court asking them to dismiss the new information charging him with first-degree murder. Again, he argued that he already stood convicted of the murder of Don Bolles and the refiling of the original charges was barred by the double jeopardy clause. However, when Adamson learned that the Supreme Court would not confine its examination to the question of prosecution on the original offense, but would interpret the plea agreement, he tried to withdraw his special action. However, the Arizona Supreme Court would not let him withdraw.

After oral argument on the special action, the Arizona Supreme Court issued

an opinion holding that, by the terms of the plea agreement, Adamson was obliged to cooperate and testify at a retrial, and that he had breached that agreement. More importantly, Justice Hays said that, by the terms of the plea agreement, Adamson had waived double jeopardy protection.

Adamson then filed a petition for habeas corpus relief in federal district court. He argued he had not breached the plea agreement. The district court, Judge Muecke, characterized Adamson's position as "legally frivolous." He termed the Arizona Supreme Court's interpretation of the plea "eminently reasonable," and concluded that Adamson, by the terms of the plea, had waived double jeopardy protections in the event of a breach.

In a memorandum decision in 1981, a panel of the Ninth Circuit affirmed,

echoing Judge Muecke's description of Adamson's position as legally frivolous, and the Arizona Supreme Court's interpretation of the plea as "eminently reasonable." Adamson v. Hill, No. 80-5941 (9th Cir., Nov. 30, 1981). (Appendix C to this petition.) This Court denied certiorari. Adamson v. Hill, 455 U.S. 992 (1982).

While that one issue, breach of the plea agreement, was winding its way through the federal system, a jury convicted Adamson of first-degree murder in Tucson in October 1980. Finding two aggravating circumstances and insubstantial mitigation, the trial court imposed death. The Arizona Supreme Court affirmed. State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983). This Court denied certiorari. Adamson v. Arizona, 104 U.S. 204 (1983).

Adamson again sought federal habeas corpus relief. The district court denied it, and a panel of the Ninth Circuit affirmed in Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985). He moved for rehearing en banc.

In its order granting rehearing en banc, the Ninth Circuit told the parties what issues it wanted briefed. One was the double jeopardy issue which had been decided against Adamson in 1981.

For the first time, Adamson argued in his supplemental brief on rehearing en banc that he did not understand that, if he breached the plea agreement, he could be prosecuted for first-degree murder.

With four dissenters, the Ninth Circuit held that: (1) Adamson did not expressly waive double jeopardy protection by the terms of the plea agreement, and (2) his refusal to cooperate for the retrial was

not a breach of the agreement. Adamson v. Ricketts, 789 F.2d 722 (9th Cir. 1986). Thus, the majority reversed this case on a point affirmed in 1981 by the same circuit, looking at the same plea agreement.

Arizona moved for rehearing, which the Ninth Circuit denied June 6, 1986.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to determine the following constitutional, and necessarily related, issues:

1. When a defendant signs a plea agreement signifying he understands that if he breaches the agreement by not testifying, he will be subject to prosecution on the original charge and the penalty that accompanies it, and then he deliberately breaches that agreement, does the double jeopardy clause prevent a refiling of the original charge?

2. Are determinations by a state supreme court as to what the terms of a state plea agreement mean and whether the actions of a defendant breached that agreement, findings of historical fact entitled to a presumption of correctness under 28 U.S.C. § 2254, and are such determinations matters of state law whose interpretation should be left to state courts?

A.

Adamson's conviction of second-degree murder under the plea agreement was vacated by the Arizona Supreme Court before he went to trial on the refiled original charge of first-degree murder.

Adamson was convicted of first-degree murder and sentenced to death. State v. Adamson, 136 Ariz. 250, 665 P.2d 972, cert. denied, 104 S.Ct. 204 (1983). He sought federal habeas relief, not even arguing his conviction violated double jeopardy. A panel of the Ninth Circuit

affirmed. Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985). The Ninth Circuit granted rehearing en banc and told the parties to brief the settled double jeopardy issue -- the law of the case since 1981. That court, split 7-4, reversed and remanded. (Opinion, Appendix A of this petition.)

The first basis for the reversal by the Ninth Circuit Court of Appeals was that Adamson could not be tried and convicted of the greater (original) charge of first-degree murder because jeopardy had attached to his conviction for second-degree murder under the plea agreement. The majority cited Brown v. Ohio, 432 U.S. 161 (1977). But that case involved a separate prosecution for auto theft while Brown's prior conviction for joyriding was in full force. It has no applicability here, as the dissenters noted, because the Arizona Supreme Court

vacated Adamson's second-degree conviction and sentence. Adamson's agreement specifically provided that if he breached, the parties would be returned to their original positions before the plea and he could be prosecuted for open murder (which includes both first and second-degree) and be subject to the death penalty. (Opinion, Appendix A, paragraphs 5, 15.) The majority of the Ninth Circuit Court simply ignored the Arizona Supreme Court's vacation of the conviction for second-degree murder. It should not have.

B.

There is no requirement that in waiving double jeopardy rights a defendant must use the phrase "double jeopardy."

Although they declined to decide whether jeopardy can be waived, the majority held that any waiver had to be

express, not implied, citing Johnson v. Zerbst, 304 U.S. 458 (1938), and concluded that because neither Adamson nor the plea agreement used the phrase "double jeopardy," Adamson did not waive these rights. This is plainly wrong under this Court's precedents, and even those of the Ninth Circuit.

This Court has said that double jeopardy protection is not the same kind of constitutional right as, for example, the right to counsel, and has implicitly rejected the contention that it must be expressly waived. United States v. Dinitz, 424 U.S. 600, 609 n.11 (1976). Long ago, this Court held that a defendant who successfully appeals his conviction has no double jeopardy objection because his action in appealing the conviction necessitated a new trial. United States v. Ball, 163 U.S. 662, 671-72 (1896). Nobody had to explain

double jeopardy to Ball before he appealed, or forewarn him he could be retried if he was successful. Similarly, a defendant's motion for a mistrial, as long as it is not provoked by intentional prosecutorial misconduct, is no obstacle to a new trial whether or not the defendant had explained to him his double jeopardy rights. United Stats v. Dinitz, supra; United States v. Jorn, 400 U.S. 470, 485 (1971). These cases, like Ball, focus upon the defendant's power to choose a course of action, either to let the issue of guilt go to the jury, or to take it from the jury.

In Santobello v. New York, 404 U.S. 257, 263 n.2 (1971), this Court said that, if the trial court permitted Santobello to withdraw from his plea, the original charges could be refiled. There was no discussion about express waiver of double jeopardy. And the Ninth Circuit

has never required an express waiver of double jeopardy when the defendant successfully has a plea set aside. United States v. Barker, 681 F.2d 589, 590-91 (9th Cir. 1982).

In Jeffers v. United States, 432 U.S. 137, 152 (1977), this Court saw no double jeopardy violation where Jeffers elected to be tried separately on two charges although one was a lesser-included of the other. Again, the focus was upon the defendant's role in bringing about the result.

Probably the clearest expression about when double jeopardy affords no protection is United States v. Scott, 437 U.S. 82 (1978). Concluding that Scott could be retried on two counts that the trial court dismissed at Scott's request before the case went to the jury, Justice Rehnquist said:

> [Double jeopardy] is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution.

437 U.S. at 96. Specifically declining to adopt a waiver analysis, this Court said:

> We do not thereby adopt the doctrine of "waiver" of double jeopardy rejected in Green. Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

Id. at 100.

When Adamson defiantly breached the plea agreement, he lost the protection of the double jeopardy clause by his voluntarily chosen course of conduct with full understanding of the consequences even though the agreement did not use the words "double jeopardy." The important thing for a defendant to know in such a situation is not the term that applies to his actions, but the consequences that

will flow from his actions. When Adamson knowingly agreed that if he breached the agreement the original charge would be restored, he knew, without saying more, that he agreed to give up his double jeopardy rights. More words would not have made the consequences any clearer.

C.

The Ninth Circuit ignored state findings of historical fact.

The majority opinion runs roughshod over Sumner v. Mata, 449 U.S. 539 (1981), by refusing to recognize that the interpretation of a state court plea agreement and the determination of a breach of that agreement are matters of state law and findings of fact entitled to the presumption of correctness under 28 U.S.C. § 2254(d). If Adamson breached the agreement, he had no double jeopardy protection. The Arizona Supreme Court said he breached. The Ninth Circuit,

however, ignored that finding and discussed how "reasonable" Adamson's interpretation of the plea agreement was. These findings by the Arizona Supreme Court should not have been ignored. Not only does a plain reading of the entire plea agreement, particularly paragraphs 5 and 15, lead to the conclusion reached by the Arizona Supreme Court, but the court's findings were in regard to a state agreement reached in state court in a state criminal prosecution and they are entitled to a presumption of correctness. Curiously enough, the Ninth Circuit gave these findings such a presumption in 1981.

Adamson knew he was breaching the agreement from the outset because he objected repeatedly in the superior court to anyone's interpreting the plea agreement. When he learned the Arizona

Supreme Court would construe the terms of the agreement, he tried to withdraw his petition for special action. Adamson v. Superior Court, 125 Ariz. 579, 580, 611 P.2d 932, 933 (1980). He did that because he knew he was breaching. The majority omits these facts from the opinion.

Conclusion

The Ninth Circuit has refused to follow clear precedent of this Court and has refused to give a presumption of correctness to state court findings. It has said that Adamson's voluntary course of conduct, which he acknowledged the state would consider a breach, did not forfeit double jeopardy protection. Even less defensibly, it concluded that the language of the plea agreement did not inform Adamson that he had no such protection if he breached the plea even though he never argued that until 1986.

The majority opinion is wrong on the law and the facts, and this Court should grant certiorari to correct it.

Respectfully submitted,

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon Timothy K. Ford, 600 Pioneer Building, Seattle, Washington, 98104, Attorney for John Harvey Adamson, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid,

addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

DATED this 3rd day of July, 1986.

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SUBSCRIBED AND SWORN to before me, this 3rd day of July, 1986.

JANET E. DYER
NOTARY PUBLIC

My Commission Expires:

December 10, 1989

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